

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ERNEST JORD GUARDADO

Case No. 2:17-CV-00879-JCM (BNW)

Plaintiff,

ORDER

v.

STATE OF NEVADA, *et al.*,

Defendants.

Presently before the court is pro se plaintiff Ernest Jord Guardado's objection to Magistrate Judge Brenda Weksler's denial of his motion for appointment of counsel. (ECF No. 74). Defendants did not respond and the time to do so has passed.

I. Background

Guardado alleges that he was transferred from Lovelock Correctional Center ("LCC") to High Desert State Prison ("HDSP") as retaliation for filing grievances against certain correctional officers in violation of his First Amendment rights. (ECF No. 14 at 7–10). On July 30, 2020, Guardado moved for appointment of counsel to assist him in properly opposing the defendants' pending motion for summary judgment. (ECF No. 56). He avers that discovery in this case is complex, he has had no access to the law library since March 2020, and that he has been unsuccessful in retaining counsel. (*Id.* at 2; ECF No. 74 at 3).

Judge Weksler held a telephonic hearing on October 13, 2020, and denied Guardado's motion. (ECF No. 71). Guardado now objects to Judge Weksler's ruling. (ECF No. 74).

1 **II. Legal Standard**

2 The district court may “reconsider any pretrial matter . . . where it has been shown that the
 3 magistrate judge’s order is clearly erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A); *see*
 4 *also* Fed. R. Civ. P. 72(a); LR IB 3-1(a). The court may “affirm, reverse, or modify, in whole or
 5 in part, the magistrate judge’s order.” LR IB 3-1(b).

6 A factual finding is clearly erroneous when “although there is evidence to support it, the
 7 reviewing court on the entire evidence is left with the definite and firm conviction that a mistake
 8 has been committed.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A legal
 9 conclusion is contrary to law when it “fails to apply or misapplies relevant statutes, case law, or
 10 rules of procedure.” *United States v. Desage*, 229 F. Supp. 3d 1209, 1213 (D. Nev. 2017) (citation
 11 omitted). Review under a clearly erroneous standard is “significantly deferential.” *Concrete Pipe*
 12 & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 623 (1993).

13 **III. Discussion**

14 Indigent civil litigants do not have a Sixth Amendment right to appointed counsel. *Storseth*
 15 *v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). In very limited circumstances, this court has
 16 the discretion under 28 U.S.C. § 1915(e)(1) to “request an attorney to represent any person unable
 17 to afford counsel” in “exceptional circumstances.” *Agyeman v. Corrections Corp. of Am.*, 390
 18 F.3d 1101, 1103 (9th Cir. 2004); *see also Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009).

19 To determine if there are “exceptional circumstances” that require appointed counsel, the
 20 court evaluates (1) the likelihood of plaintiff’s success on the merits and (2) the plaintiff’s ability
 21 to articulate his claim pro se “in light of the complexity of the legal issues involved.” *Agyeman*,
 22 390 F.3d at 1103 (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)). Neither
 23 of these factors is dispositive and both must be viewed together. *Wilborn*, 789 F.2d at 1331.

24 This court cannot say that Judge Weksler’s denial of Guardado’s motion for appointment
 25 of counsel was clearly erroneous or contrary to law. There is a likelihood Guardado’s claims can
 26 succeed on the merits because they survived the screening process. *See Garcia v. Las Vegas*

1 Metro. Police Dep't, No. 2:17-cv-02504-APG-BNW, 2020 WL 3404730, at *2 (D. Nev. June 19,
 2 2020).

3 But Guardado can articulate his claims pro se. Guardado claims to have no access to the
 4 law library because of the COVID-19 pandemic. (ECF No. 74 at 4). Prisoners have a right of
 5 access to the courts. *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). And this right includes
 6 “access to a reasonably adequate law library for preparation of legal actions.” *Id.* at 578–79.
 7 Nevertheless, Judge Weksler found that Guardado has been in communication with the law library
 8 as evidenced by the documents supporting his motion requesting submission of exhibits. (ECF
 9 No. 70). He has filed several motions with supporting points and authorities as well. And an
 10 inability to retain counsel does not rise to the level of “exceptional circumstances” either. *See*
 11 *Garcia*, 2020 WL 3404730 at *2. The caselaw Guardado cites in support of appointing him
 12 counsel—*Koerschner v. Warden*, 508 F.Supp.2d 849 (D. Nev. 2007), and *Moxley v. Neven et al*,
 13 2:07-cv-01123-RLH-GWF—involved the appointment of federal habeas counsel and not
 14 appointment under 28 U.S.C. § 1915(e)(1). (ECF No. 56 at 3).

15 At bottom, Judge Weksler ruled that Guardado does not face “insurmountable objects to
 16 being able to petition the court for redress as needed” and this court will not disturb that ruling.
 17 (ECF No. 71).

18 **IV. Conclusion**

19 Accordingly,

20 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Magistrate Judge Brenda
 21 Weksler’s order denying Guardado’s motion for appointment of counsel (ECF No. 56) be, and the
 22 same hereby is, AFFIRMED.

23 DATED November 12, 2020.

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UNITED STATES DISTRICT JUDGE